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DEC 15 1992

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 92-253

In re Applications of

BAKCOR BROADCASTING, INC., Debtor
c/o DENNIS ELAM, TRUSTEE

For Renewal of License of
Station KLIK(FM), Lubbock, Texas

SOUTHWEST EDUCATIONAL MEDIA
FOUNDATION OF TEXAS, INC.

For Construction Permit for a new FM
Station on Channel 229C1, Lubbock, TX

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) File No. BRH-900330VV
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) File No. BPED-900629MK
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To: Administrative Law Judge Walter C. Miller

OPPOSITION TO MOTION TO ENLARGE ISSUES

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December 15, 1992

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ENCLOSURE

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SUMMARY

This is an opposition to motion to enlarge issues. As discussed herein, the petitioner herein is double-minded. One moment it files pleadings with the FCC saying that grant of SEMFOT's application would be in the public interest. The next moment it digs up its old pleadings, since repudiated, and re-files them. Bakcor/Elam cannot keep switching sides and remain believable.

The fact is that Bakcor/Elam's motion is based almost entirely on speculation, conjecture and surmise. It is based on pleadings filed by another party (Williams Broadcast Group) which has since withdrawn its pleadings. There simply is no credibility to the motion to enlarge issues whatsoever.

For example, Bakcor contends that SEMFOT has not demonstrated that it is qualified as a noncommercial applicant when, in fact, the Commission has specifically ruled on SEMFOT's programming being carried in the very market for which this application has been filed. Bakcor also contends that the applicant is financially unqualified when it has already in effect operated the proposed station for a period of time and has placed in escrow funds to purchase the broadcast equipment. (In addition, it already has all the equipment required to build on hand).

SEMFOT has demonstrated its ability to build and operate a NUMBER of radio stations in the region of the country where this station is to be located. The suggestion that SEMFOT's proposal is not capable of effectuation is absurd. Bakcor/Elam's motion to enlarge issues completely misstates and distorts the facts, relying almost entirely on Williams' pleadings which have since been withdrawn. The motion must be denied *in toto*.

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OPPOSITION TO MOTION TO ENLARGE ISSUES

Southwest Educational Media Foundation of Texas, Inc. ("SEMFOT"), by its counsel, herewith submits its opposition to the MOTION TO ENLARGE THE ISSUES filed on November 30, 1992, by Bakcor Broadcasting, Inc., Debtor, c/o Dennis Elam, Trustee ("Bakcor" or "Elam"). In support whereof, the following is stated:

Preliminary Statement

1. As stated in footnote 2 of Bakcor's motion, "Bakcor raised the issues contained in this motion in a Petition to Dismiss or Deny filed May 1, 1991." However, on July 12, 1991, Bakcor/Elam filed a JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT which would have resulted in the grant of the above-captioned application of SEMFOT. Paragraph 3 of that document states: "Accordingly, the Applicants hereby request dismissal of the KLIK(FM) renewal application and a grant of Semfot's

competing application for a construction permit for a new FM broadcast station at Lubbock, Texas, on the frequency presently occupied by KKIK(FM)...." Bakcor/Elam submitted with that settlement agreement a verification, under penalty of perjury, that approval of the agreement would serve the public interest.

2. On October 3, 1991, the parties filed a supplement to the joint request which modified the terms of the settlement but ratified the request for grant of the SEMFOT application which is the subject of this proceeding. In other words, Bakcor/Elam knew all of the facts raised in the instant motion to enlarge issues and yet continued to prosecute a settlement with the Commission requesting approval of the instant SEMFOT application as being in the public interest. Accordingly, Bakcor/Elam's motion to enlarge issues is inherently suspect since Bakcor/Elam takes whatever side of the issue is convenient at any particular time.

3. It is also noted that much of Bakcor/Elam's motion rests on pleadings previously filed against SEMFOT by "Williams Broadcast Group, a Caprock competitor." (Motion at para. 2). However, Bakcor/Elam fails to advise the Presiding Judge that the pleadings filed by Williams have been dismissed by the Commission by letter, dated October 7, 1992 (Exhibit 1 hereto). Like Bakcor/Elam, Williams' pleadings were motivated by its own competitive goals. They were promptly dismissed when they no longer served Williams' interests.

Preconstruction Issue

4. It is noted that while Bakcor/Elam use the terms "ATKINS Stations" and/or "the ATKINS and ATKINS APPLICATION" etc., SEMFOT is a duly registered and state chartered non-profit corporation

which has already been approved by the Commission to operate non-commercial educational broadcast stations. The applicant here is SEMFOT not T. Kent Atkins or Mary Helen Atkins individually. The president of SEMFOT, T. Kent Atkins, is also president of Caprock Educational Broadcasting Foundation ("Caprock") which operates a noncommercial educational FM station, KAMY, Lubbock, Texas. Bakcor/Elam correctly points out in para. 3 of its motion that "Caprock did not dispute that it commenced operations at an unauthorized site prior to receiving Commission consent." Mr. Atkins explained that "the applicant proceeded with construction under the mistaken belief that it would lose its permit if it did not place the station on the air prior to the expiration date of its existing permit." (Opposition to Petition to Deny, para. 2, Ex. 2 to Bakcor motion). Caprock also pointed out (para. 20 of Opposition) that:

...Williams does not come to the Commission with "clean hands." According to its own affidavits, Williams knew as early as January of this year that Caprock was building its station at the wrong site. However it never notified Caprock or the Commission to abort this allegedly "unlawful" behavior. Apparently, Williams was more interested in building a case against Caprock so that it could destroy its "competition" than it was in stopping the "unlawful" behavior.

5. The allegations Williams filed with the Commission were exactly that - allegations. Much of the "substantiated" affidavits and photographic evidence that Williams submitted has been challenged by SEMFOT on numerous occasions. The fact is that neither Williams nor Bakcor/Elam have been motivated by the "public interest" in their efforts to have Mr. Atkins disqualified as a Commission licensee. Their interests are solely that of seeing a competitor eliminated for their financial benefit.

Mr. Atkins has admitted his mistakes. Indeed, Mr. Atkins has expressed his willingness to withdraw from broadcasting if that is what is required to preserve the licenses entrusted to him. Mr. Atkins' motivation is his desire to serve the people of Lubbock (and other communities). In so doing, he has made certain mistakes in assuring strict compliance with Commission rules. The omissions made were not out of an evil motive but out of a zeal to serve. He has gained no fame, power, or wealth from his efforts to provide a non-profit educational service to the community. He has worked long, hard hours with little reward other than the satisfaction that comes from knowing that the programming being aired is appreciated by the people being served.

6. It is understood that the Commission has an interest in assuring that licensees comply strictly with the rules. Mr. Atkins accepts full responsibility for his failure in assuring strict compliance. However, against this must be weighed the public's interest in assuring the continuation of the broadcast service which is being provided by SEMFOT and affiliates. The fact that the "public" (whose interest the "public interest" is) desires the continuation of this service is demonstrated by the fact that the listening audience donated \$75,000.00 to preserve the service (in response to Elam's demand for payment - see para. 6-8 of Nov. 27 motion to enlarge issues filed against Bakcor/Elam in this proceeding). The fact is that no question has been raised concerning SEMFOT'S service to the public. The issues which have been raised relate solely to technical compliance with Commission rules.

7. In considering the matter of the "preconstruction" of the Caprock facilities, it is important to consider the historical background. Caprock was an applicant for certain noncommercial radio stations, including applications in Lubbock and Amarillo, TX. Mr. Atkins had no part in Caprock. SEMFOT had filed a mutually exclusive application for facilities in Lubbock. Mr. Atkins became a principal of Caprock as a result of a settlement achieved in the comparative proceeding. Thus, Mr. Atkins had not been involved with Caprock when it filed its original applications for the stations in Lubbock and Amarillo and was not personally familiar with the transmitter sites proposed in those applications. When he took over the helm of Caprock, new transmitter sites had to be found.

8. Mr. Atkins filed the application to move the Lubbock transmitter site on March 28, 1988 (BMPED-880328MM). Construction was begun nearly a year later with the station commencing operations on April 10, 1989. Mr. Atkins mistakenly believed that it was permissible to build at the new site upon filing the required application. It was only upon receiving Williams' pleadings that he was informed by undersigned counsel that it was impermissible to build at the new site until the application was granted. While Atkins' actions violated Commission Rules, his motivation was simply to provide service to the communities involved as expeditiously as possible (something which the Commission has on innumerable occasions found to be in the "public interest" in granting settlements of comparative proceedings). Were it the case that Mr. Atkins' motivation was simply to disre-

gard the rules, why file the application to change the transmitter site at all? Mr. Atkins filed the application to change transmitter site in an attempt to comply with Commission requirements.

9. Likewise, Atkins commenced construction in an effort to comply with the Commission deadline for completing construction. As indicated in the "Declaration of T. Kent Atkins" (see Ex. 2 of Bakcor/Elam motion to enlarge), the KAMY construction permit had been granted on October 16, 1987. Therefore, the expiration date was April 16, 1989. Atkins rushed to meet the April 16 deadline for construction for fear of losing the permit - commencing operations on April 10, 1989. The irony here is that Atkins "sin" was that he moved expeditiously in his efforts to comply with Commission requirements. Due to his ignorance of correct procedure, he ended up violating Commission rules in his efforts to comply with the Commission deadline. The fact is that he filed his modification application more than a year prior to the expiration date of the construction permit which normally would be more than ample time for the Commission to process the change application. However, the Commission apparently places a low priority on noncommercial applications. Had the Commission processing staff moved at its normal rate in processing this application, it would have been granted in more than ample time for Caprock to build the station and be in compliance with the Commission rules. Mr. Atkins' efforts to comply with the Commission's rules (and to meet the "public interest" requirement of expeditiously commencing operation of a new facility to serve the public of Lubbock) coupled with a delay in Commission processing

resulted in an unfortunate violation of Commission rules which Williams and Bakcor/Elam have attempted to exploit to the fullest.

10. Bakcor/Elam continues its harangue by stating "in spite of its professed contrition, Caprock appears to have repeated its misconduct in connection with Station KLMN(FM), Amarillo, Texas." (Bakcor/Elam motion at para. 4). Apparently Bakcor has failed to investigate the facts for itself but rather has simply reiterated reckless charges made by Williams. For the record, Mr. Atkins faced the same difficulty with the Amarillo permit that he faced with the Lubbock permit. He was not involved with the application as originally filed and had not been involved in the selection of the original transmitter site. On March 21, 1988, Mr. Atkins (now a principal of Caprock) filed an application to modify the KLMN(FM) construction permit (File No. BPED-880321IA). KLMN commenced operation on May 11, 1988.

11. Atkins has admitted that the same mistake was made in connection with KLMN - that the station was built at the site specified in the modification application. However, the implication made in Williams' pleading, which Bakcor/Elam relies on, is that the KLMN construction was done after the KAMY problem was brought to Atkins' attention. This is not so - as the above dates reflect. KLMN was built a year before KAMY. Therefore, there is no truth to the allegation that, having been caught in connection with KAMY, Atkins proceeded to do the same thing in connection with KLMN, thereby demonstrating a lack of true "contrition."

12. Mr. Atkins' violated the Commission's rules in con-

structing without a grant of the Caprock modification application. This is conceded. However, Atkins' expeditious filing of an application to change the transmitter site, his attempt to meet the expiration date of the construction permit and his effort to expeditiously commence construction indicate an effort on his part to serve the "public interest." This is not an applicant with an improper motive, Williams and Bakcor/Elam's protestations to the contrary notwithstanding. (Bakcor/Elam have presented no "evidence" of improper motive here - only "speculation"). Bakcor/Elam's motive in painting Atkins as a dastardly villain is apparent - it is in its competitive best interest. Nevertheless, a review of the record, considered as a whole, establishes no improper motive on Atkins' part but rather an overzealous desire to provide service to the public as expeditiously as possible.

13. Bakcor/Elam next spices its pleading with the statement that the "saga does not end there" (the "there" referring to the untrue comment regarding lack of "contrition" on Atkins' part). The next stage in the Bakcor/Elam unfolding drama is the fact that "Atkins and his wife sought to resign from the Board of Directors of Caprock." (Para. 5 of motion). Atkins has admitted his mistakes and sought to do the honorable thing by resigning. How is this contrary to the public interest?

14. Bakcor/Elam continues (para. 6 of motion) by stating that "according to Williams, the investigation of Atkins' stations continues apace and Atkins' various rule violations and candor 'are the subject of a sixty-five page Report' compiled by the Commission's staff." This is an interesting tactic employed

by both Williams and Bakcor/Elam. Williams in fact told Mr. Atkins during one meeting that "if you tell a lie enough times someone is bound to believe it." Mr. Williams was simply repeating Friedrich Nietzsche's (and later Adolph Hitler's) famous paradigm - now borrowed by Bakcor/Elam. While it is apparent that the Commission has investigated Atkins' various operations, Atkins has never seen any "sixty-five page Report" and does not even know if one exists. It certainly cannot defend itself against something it has never seen. It is noted for the record that Williams at one time filed a pleading stating that the "sixty-five page Report" was going to be released momentarily. It has yet to surface over a year later.

15. In summary, Bakcor/Elam are correct in stating that Atkins' violated the Commission's rules in constructing KLMN and KAMY at new sites prior to receiving authorization to change sites. Atkins has admitted these facts. However, the charges made that Atkins violated the Commission's rules with an improper motive are based on pure speculation. The only evidence of record is Atkins' admission and his statement that he did not fully understand or appreciate Commission requirements regarding construction of the stations. His motive was to meet the deadlines specified by the Commission and to provide service to the community expeditiously. While Atkins' failure to follow correct procedures was wrong, Bakcor/Elam has certainly presented no evidence to prove that his "motives" were wrong.

16. It is also noted that the transgressions of Atkins pointed out here were in his capacity as a principal of Caprock. These violations were not made by SEMFOT, and Mr. Atkins has

tendered his resignation from SEMFOT. In light of the above, there is no basis for enlarging the issues to try what amounts to a character issue relating to Atkins when no wrongful motive has been demonstrated and Atkins has indicated his willingness to resign from SEMFOT if the Presiding Judge will permit him to do so. This portion of the Bakcor/Elam motion should be denied for failure of proof of any improper motive.

Reporting Violations

17. Bakcor/Elam seeks reporting violations for various reasons, including the fact that SEMFOT failed to report the fact that it was being investigated by the Commission. While Bakcor/Elam concedes that FCC Form 340 does not require the reporting of such matters, it nevertheless argues that the failure to report was a serious violation of Commission rules. Of course, even Bakcor/Elam might concede the fact that an applicant is not required to report facts which are unknown to it. This application was filed in 1990. To the best of counsel's knowledge, SEMFOT had no notification from the Commission of an investigation when this application was filed. The Commission has never provided SEMFOT with any investigative report, much less the "65-page Report" alleged to exist. For obvious reasons, the Commission has not kept SEMFOT apprised of the details of its investigation or even that an investigation was being conducted (until earlier this year). Williams apparently had more knowledge about the Commission investigation than SEMFOT, having used political contacts to spur the investigation on. To hold that SEMFOT is at fault for not reporting something it initially had no knowledge of (other than what Williams alleged) to the Commis-

sion (which was the party conducting the investigation) is patently absurd.

18. Next, Bakcor/Elam points out that SEMFOT initially failed to list all other pending applications which were on file with the Commission (motion at para. 10). As pointed out in footnote 7, all but one of these applications were filed at the same time the instant application was filed. Obviously, Atkins was aware of the other applications filed at the same time, but it is equally obvious that they were not pending applications at the time he signed the instant application. While experienced FCC counsel may have foreseen the need to report applications which were "about to be filed," Mr. Atkins is not a lawyer and was not assisted by a lawyer in completing the application. He simply did not think to report these anticipated filings. They were, of course, ultimately reported by amendment filed July 5, 1991. With respect to the other application (Lawton, OK), SEMFOT had already requested dismissal of the application prior to the filing of the instant application. While technically the Presiding Judge in that case did not order the application dismissed until July 13, 1990 (FCC 90M-2052), Mr. Atkins can hardly be faulted for failing to list an application as pending which he had requested be dismissed and which was subsequently dismissed by order of the Presiding Judge.

19. Mr. Atkins also failed to report "dismissed" applications (motion at para. 11). Undersigned counsel has frequently dealt with clients who misunderstand this question. They think it refers only to applications involuntarily dismissed by action of the Commission. In fact, undersigned counsel was faced with a

similar question in connection with a recent assignment application because the applicant involved had applied for stations some years ago and could not remember the file numbers, etc. The Commission staff indicated that all they were concerned with is whether the dismissals were in connection with applications which left unresolved character issues. They accepted a statement from the applicant that none of the "dismissed" applications left character issues unresolved in lieu of an accurate listing. Here, none of the dismissed applications left unresolved character issues against SEMFOT or Atkins. The failure to understand the need to report applications voluntarily dismissed by the applicant was a technical error. However, no intent to deceive was present, and none of the dismissed applications left unresolved character issues. [The charge that SEMFOT was concealing the number of pending applications in the hope of cutting off inquiry into financial questions is outrageous and just another example of how fast and loose Bakcor/Elam are with the truth when it benefits their case. Further, SEMFOT decided to dismiss its pending Waco application because the other applicants were all local residents of Waco and claimed preference for such. One was a minority and a local resident of the community and ultimately won the case. The application was dismissed because the applicant was in a poor comparative position not because of a lack of financial qualifications.]

20. Finally, Bakcor/Elam points out that Atkins failed to report numerous LPTV applications filed by Atkins' wife. As pointed out in the motion to enlarge issues in the Waco case (Exhibit 6), SEMFOT had reported in the Waco application that

"Mary Helen Atkins has 'numerous L.P.T.V. applications pending.'" This information was provided because SEMFOT did not have records to determine exactly what applications remained on file. Most had been dismissed or denied. Had SEMFOT intended to conceal the fact that numerous LPTV applications had been filed, why did it report that fact in the Waco application? The problem which SEMFOT faced with the reporting of the LPTV applications in the Waco proceeding is that it simply did not have records to know how many were still on file.

21. At the time the instant application was filed, Mr. Atkins believed that all of the LPTV applications had been disposed of (through lottery or being returned as unacceptable). He did not report them as pending because he did not know they were. In fact, Exhibit 7 to the motion to enlarge demonstrates the fact that most of the applications had either been returned or dismissed. (All of the applications preceded by the number 66 were returned; all of the applications preceded by the number 67 were denied - see legend at end of list).

22. When Bakcor filed its Petition to Dismiss or Deny on May 1, 1991, it submitted a list which it stated was derived from Commission records and which indicated that a number of the LPTV applications were still pending. Mrs. Atkins promptly filed a request for dismissal of all pending LPTV applications which might continue to be on file with the Commission. There certainly can be no motive to deceive here. SEMFOT had reported the pendency of the LPTV applications in an earlier proceeding. Why try to hide what was previously reported? It is obvious that Mr. Atkins believed that there were no longer any such applications

pending. In light of these facts, the failure to report certain "allegedly" pending LPTV applications (assuming that Bakcor's records were in fact based on accurate data) is of no decisional significance. Again Bakcor/Elam have made a mountain out of a molehill. While making much of the failure to report various matters, Bakcor/Elam have presented no evidence whatsoever demonstrating an improper motive on the part of SEMFOT or Atkins. Their allegations of improper motive are pure speculation. This portion of the motion to enlarge issues must be denied since no showing has been made that the omissions (which were subsequently corrected) are of any decisional significance in this proceeding.

SEMFOT'S Financial Qualifications

23. Bakcor/Elam's attack on SEMFOT's financial qualifications is based on sheer speculation and conjecture. In fact, SEMFOT has already demonstrated its ability to operate the proposed new station. Under the above-mentioned settlement agreement, SEMFOT had obtained permission to rebroadcast KAMY over KKIK (the station whose facilities are being sought herein). SEMFOT did in fact rebroadcast KAMY over KKIK for a period of several months until Elam reneged on the agreement. There can be no question that SEMFOT is capable of operating the station because it has already in effect operated the station.

24. SEMFOT had agreed to pay Elam \$75,000.00 for the physical assets of KKIK, including all transmission equipment. That money was not only raised, it was placed in escrow by SEMFOT in an effort to meet Elam's demands when he threatened to pull out of the agreement. Therefore, SEMFOT has already demonstrated its ability to operate the station, and it has also already placed in

escrow funds required to purchase the technical facilities of the proposed station.

25. The manifest demonstration of SEMFOT's financial qualifications does not end there. SEMFOT had (and has) on hand all the equipment necessary to operate the proposed new station even before the application was filed. Thus SEMFOT could have built the station in a heartbeat even if it had not raised the money to purchase the KKIK facilities from Elam. Indeed, even Bakcor/Elam's motion to enlarge issues demonstrates the fact that Atkins has additional equipment "on hand." Attached to Exhibit 1 of the motion is an affidavit of Edward C. Dulaney, Assistant Director of Engineering for Williams' station in the area. Mr. Dulaney actually went to the KAMY transmitter building and inspected the contents thereof. Mr. Dulaney states:

On the far right to the inside of the building was a Gates 1,000 watt transmitter. On the far left of the building was a CCA 10,000-watt transmitter, to which the Gates transmitter appeared ready to be connected. In between the transmitters was a rack of equipment which contained two STL receivers, an Orban 8000 Limiter, a Gentner remote control unit, an exciter, and other items.

Mr. Dulaney was so kind as to provide photographs, including a photo of the CCA transmitter. While Williams' charges that the CCA transmitter was being utilized for operation of KAMY are false (the transmitter is not yet hooked up), the existence of additional broadcast equipment has been documented. As indicated in Section V-B, para. 3, of the instant application, the new station will be collocated with KAMY at the KJTV-TV site (where Dulaney's photographs were taken). Additional equipment is on hand at a storage facility in Lubbock which undersigned counsel

has personally visited.

26. Given the fact that SEMFOT has already in effect operated the KKIK facility, has placed in escrow the funds required to purchase the KKIK equipment, and already had on hand all equipment necessary to operate the proposed new facility operating on the KKIK frequency, there is no question that SEMFOT is able to construct and operate this facility. Therefore, Bakcor/Elam must ask the Commission to ignore the reality of the situation in Lubbock and look to a fiction of Bakcor/Elam's making. Bakcor/Elam charges that even if SEMFOT does have the manifest ability to build this station, its financial qualifications must be questionable because of the numerous other applications filed as discussed in its harangue on reporting violations.

27. The fact is that the only other application which SEMFOT has on file requiring construction of another station is that for purchase of the unbuilt KBTT permit. While Bakcor/Elam makes much of the numerous LPTV applications which were pending at the time the instant application was filed, the fact is that Atkins was not personally aware that they were still pending. When the fact was alleged that a number were still pending, Mrs. Atkins filed a request for dismissal. There was no reason for Atkins to take into account the pending LPTV applications because he was not aware that any were still pending before the Commission at the time he filed the instant application. Furthermore, the LPTV applications were not filed by SEMFOT. Therefore, they would not impact on the qualifications of SEMFOT which already had the equipment on hand (and thus would not be affected by any financial requirements relating to other applications controlled

by either Atkins).

28. The same is true with respect to the permit held by Mr. Atkins for a new TV station in Longview, TX, i.e. Mr. Atkins' ability to build that station would have no impact on SEMFOT's ability to construct the instant station with equipment already "on hand" and, indeed, a staff already in place (the KAMY staff). The reason the Longview station was never built is as follows. After Atkins obtained the permit from the original permit holder, undersigned counsel was approached by counsel for another television station in the area to negotiate the use of the Longview station as a "satellite." It quickly became clear that this was the only practical use for the station. However, the deal fell through when the television network involved refused to permit the proposed satellite operation in the market. Without network approval, the station was simply not viable, and Atkins let the permit expire. A change of circumstances, beyond Atkins' control, rendered the proposed station infeasible. This should have no impact on consideration of SEMFOT's ability to construct the proposed Lubbock facility whatsoever.

29. At the time the instant application was filed, the only other pending application was that for Lawton, OK, which SEMFOT had already dismissed as discussed previously. In addition, new applications were filed at the same time for San Angelo, Brownfield, Slaton and Midland. These four applications (all of which have since been dismissed) are the "numerous applications" which Bakcor/Elam alleges make the SEMFOT financial qualifications "suspect" despite the fact that SEMFOT has already demonstrated its ability to operate this facility and despite the fact

that its sister corporation CAPROCK is already operating a facility in the market and despite the fact that the Atkins are principals of some seven stations which are currently operating. SEMFOT and Atkins have demonstrated their ability to build and operate stations in the past. There is not one shred of evidence to indicate that they may not be able to do so in the future. Indeed, it has been amply demonstrated that they can most certainly operate the instant facility as discussed above. Bakcor has submitted no basis, other than sheer speculation and innuendo, for designation of a financial issue against SEMFOT. This portion of Bakcor/Elam's petition must likewise be denied.

SEMFOT is Qualified as a Noncommercial Applicant

30. Bakcor/Elam's final argument is that SEMFOT has not met its burden to show that it is entitled to eligibility as a non-commercial educational applicant. (Motion commencing at para. 16). Bakcor/Elam goes so far as to state, in F.N. 11, that if "SEMFOT [had] applied on a reserved channel, its application would certainly be dismissed for this deficiency without hearing." This argument is amazing since SEMFOT has already applied for and received grants for operating noncommercial educational broadcast facilities operating on reserved channels as was referenced in the instant application (Section II, par. 2).

31. SEMFOT recognizes that a more detailed showing might be necessary in the case of a new applicant whose qualifications had never been passed on. However, this is the case of an applicant which has already been approved by the Commission to operate non-commercial educational stations on "reserved" channels. SEMFOT

operates such stations in Amarillo, Lubbock, Lake Charles and Odessa. It also operates two stations on commercial frequencies (KENT, Odessa, TX and KRGH, Amarillo, TX) which have never aired a commercial announcement in their existence despite the fact that they are on commercial frequencies. SEMFOT publicly raises its support twice a year through on air "pledge drives" not through commercial sponsorship.

32. Indeed, SEMFOT's noncommercial operation has specifically been passed on in the Lubbock market at issue in this proceeding - in connection with the operation of KAMY. Attached hereto as Exhibit 2 is a letter from the Commission to Caprock, noting that it proposed to carry programming provided by SEMFOT (as a consequence of the above-mentioned settlement). The Commission requested a showing to demonstrate that the proposed station would be in compliance with Section 73.503 of the Commission's rules. A detailed response was filed with the Commission which demonstrated how the station would meet Commission requirements "through the new programming received from S.E.M.O.F.T. [SEMFOT]." After reviewing the SEMFOT programming proposal in connection with the Caprock application, the Caprock construction permit was granted on October 16, 1987. The SEMFOT filing is a matter of public record at the Commission should Bakcor/Elam wish to research the matter. It is also noted for the record that two of SEMFOT's board members have taught in both the public and private sectors. One has been teaching continuously for 16 years. Two have taught at the college and university level. Two of SEMFOT's board members hold teaching degrees in their respective fields. One holds both a masters and a doctors degree from

accredited graduate schools.

33. In short, Bakcor/Elam has played fast and loose with the facts. Contrary to its assertion that the Commission would dismiss the SEMFOT application if it were for a reserved channel, the Commission has specifically reviewed and approved the SEMFOT programming for Caprock's noncommercial operation in Lubbock. SEMFOT properly noted in its application that it has already received approval to operate noncommercial educational broadcast facilities. In addition, the SEMFOT programming has been expressly approved in connection with Caprock's station in Lubbock.

34. Finally, the Mass Media Bureau did in fact accept the instant application for filing and did not dismiss it for failure to pay the filing fee or otherwise demonstrate that the applicant qualified as a noncommercial applicant. Bakcor/Elam's motion is in effect an improper request for reconsideration of matters already passed on by the Commission and should be dismissed as procedurally defective. If not dismissed, it should be denied since the Commission has already ruled on SEMFOT's qualifications.

Discovery

35. Bakcor/Elam concludes its pleading by stating: "Should the requested issues be added, Bakcor would seek to depose T. Kent Atkins, Mary Helen Atkins, and perhaps other individuals with knowledge of the facts, and would request that the documents described in Exhibit 10 to this motion be produced." Bakcor/Elam's inclusion of discovery procedures in its motion to enlarge issues is apparently being undertaken pursuant to Section 1.229(e) of the Commission's Rules. However, that section of the

rules applies to "comparative broadcast proceedings involving applicants for only new facilities...." It does not apply to comparative renewal proceedings. Therefore, this portion of Bakcor/Elam's pleading should be stricken.

36. If not stricken, the document production request must be denied. Section 1.325 of the Rules and Regulations of the Federal Communications Commission requires that documents be produced only when "good cause" has been shown. In Jefferson Standard Broadcasting Co., 20 RR 2d 1001, the Commission stated, at page 1005:

... It is incumbent upon the party seeking discovery under rule 1.325 to show good cause therefore, that is, to demonstrate (as opposed to recite) not only the relevance of the requested documents to the hearing issues, but also the movant's need for the information in the preparation or prosecution of its case.

37. Bakcor/Elam has not made the required "good cause" showing discussed in Jefferson Standard. It has not even shown how the requests are relevant. For example, document request 17 seeks "All documents related to expenditures made by SEMFOT and other noncommercial applicants, permittees or licensees in which T. Kent Atkins or Mary Helen Atkins is a principal, including but not limited to financial statements, ledgers, audits, tax returns, payroll and expense records related to T. Kent Atkins and Mary Helen Atkins." Bakcor/Elam gives not even a clue of what these documents are relevant to and certainly does not submit a "good cause" showing for their production.

38. There are over 19 categories of documents being requested. In each category, "all" of a certain type of document are requested. Not only has Bakcor/Elam failed to show "good

cause" or "relevance," it is clearly seeking to harass SEMFOT into submission with "overly broad" requests such as these. To seek all "financial statements, ledgers, audits, tax returns, payroll and expenses records related to T. Kent Atkins and Mary Helen Atkins" is not only overly broad, it constitutes an improper "fishing expedition" (Regal Broadcasting Corp., 15 RR 2d 703, at 706 (para. 5)) and harassment on the part of Bakcor/Elam.

39. In conclusion, the document production request filed by Bakcor/Elam is procedurally defective, does not comport with Commission requirements as to good cause or even "relevance," is clearly intended as a fishing expedition and harassment, and should be summarily dismissed or, if not dismissed, denied. If the Presiding Judge determines that the request should be considered at all, SEMFOT should be given ten (10) days from the date of the Judge's ruling to submit a detailed response to the request (as Section 1.325 of the Commission's rules permits).

WHEREFORE THE PREMISES CONSIDERED, it is respectfully requested that the Presiding Judge deny the motion to enlarge issues filed by Bakcor/Elam in the above-captioned proceeding.

Respectfully submitted,

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